

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CN9400946  
1800C4-YPL

Honorable Charles E. Grassley  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510-1501

Dear Senator Grassley:

Thank you for your letter on behalf of Reverend Henry J. Koopman. Rev. Koopman inquires as to the reasons that the Commission has designated for hearing the renewal applications of The Lutheran Church - Missouri Synod for KFUE and KFUE(FM).

Enclosed is a copy of the Commission's Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture ("HDO") in the referenced case, which was released February 1, 1994. The reasons for the Commission's action are fully set forth in the HDO.

Sincerely,



Roy J. Stewart  
Chief, Mass Media Bureau

Enclosure

REPLY TO:

- ☒ 135 HART SENATE OFFICE BUILDING  
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# United States Senate

CHARLES E. GRASSLEY

WASHINGTON, DC 20510-1501

February 24, 1994

REPLY TO:

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Federal Communications Commission  
Director, Office of Legislative Affairs  
1919 M Street NW  
Washington, D. C. 20554

Dear Mr. Director:

Enclosed please find a copy of a letter I have received from one of my constituents regarding actions by FCC and radio stations run by the Lutheran Church.

I would greatly appreciate your assistance in responding to Rev. Koopman.

Thank you for your help and cooperation.

Sincerely,



CHARLES E. GRASSLEY  
U. S. Senator

CEG:bb

Committee Assignments:

FINANCE  
AGRICULTURE, NUTRITION, AND FORESTRY

JUDICIARY  
OFFICE OF TECHNOLOGY ASSESSMENT

BUDGET  
SPECIAL COMMITTEE ON AGING

## Zion Lutheran

Ash & E. 3rd St.  
Auburn, IA 51433  
688-2810



## St. Peter Lutheran

Rural 9 mi. SE  
Sac City, IA 50583  
662-7392

17 February, 1994

HK94.25

Senator Charles Grassely  
United States Senate  
Washington, DC 20510

Senator Grassley:

Greetings from west central Iowa. I pray you all survived that shipment of Minnesota winter we sent you the early part of the month. Something that good (?) just has to be shared with friends (?). Just remember, the mud of March is just around the corner.

But that's not why I'm writing. Rather, I'd like to ask you, or one of your staff, to look into just why the Federal Communications Commission has ordered a hearing on allegations against the Lutheran Church - Missouri Synod's radio stations, KFUD (AM & FM). Those radio stations are out-reach tools of our denomination, not money-makers.

They also happen to be places where a few seminary students find employment close to their campus. (Our denomination provides very limited financial support for its seminary students, and most must work part time as well as go deep in debt). It's also a chance for some seminary students to get a feel for how they might make use of the radio when they graduate and go out to serve a parish.

I only have one side of the story so far, but that side disturbs me. I'd appreciate anything you or your staff can do to reconcile this matter. Thank you for your time and effort.

yours in Christ:

*Henry J. Koopman*

Rev. Henry J. Koopman -- Pastor

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 94-23

In re Applications of	)	
	)	MM Docket No. 94-10
The Lutheran Church/	)	File Nos. BR - 890929VC
Missouri Synod	)	BRH - 890929VB
	)	
For Renewal of Licenses	)	
of Stations KFUD/KFUD-FM	)	
Clayton, Missouri	)	

**HEARING DESIGNATION ORDER  
AND NOTICE OF OPPORTUNITY FOR HEARING  
FOR FORFEITURE**

Adopted: January 31, 1994 ; Released: February 1, 1994

By the Commission: Commissioner Quello concurring and issuing a statement.

**I. INTRODUCTION**

1. The Commission has before it for consideration: (i) license renewal applications filed for the above-captioned radio stations in Clayton, Missouri; (ii) a Petition to Deny timely filed on January 2, 1990, by the Missouri State Conference of Branches of the NAACP and various local NAACP branches (collectively "NAACP") against the renewal applications of the captioned broadcast stations<sup>1</sup>; (iii) the opposition to the petition filed by the licensee on February 23, 1990; (iv) the licensee's responses to staff letters of inquiry; (v) the NAACP's reply comments and additional pleadings; and (vi) the licensee's responses to NAACP's comments and additional pleadings.<sup>2</sup>

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<sup>1</sup> The renewal applications of several other petitioned Missouri stations have been addressed in a separate Commission order.

<sup>2</sup> Although Section 1.45 of the Commission's rules, 47 C.F.R. § 1.45, does not authorize the additional pleadings filed by either party subsequent to the NAACP's reply pleadings, we will consider the submissions in this case as part of our overall public interest analysis. 47 U.S.C. § 309(a).

2. STANDING. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show ... that a grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]. 47 U.S.C. § 309(d)(1); Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988) (Astroline); Dubuque T.V. Limited Partnership, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with knowledge of the facts alleged. 47 U.S.C. § 309(d)(1).

3. Along with its petition, the NAACP submitted a sworn declaration from Rev. James F. DeClure, president of the St. Louis Branch of the NAACP who indicates that he listens to stations KFUD/KFUD-FM and that he would be seriously aggrieved if the petition is not granted. Accordingly, we find that the NAACP has standing to petition KFUD/KFUD-FM's renewal applications.

4. EEO RULE. Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080(b) and 73.2080(c).

5. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987) (Broadcast EEO), petition for recon. pending; see also 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC, 854 F.2d 501, 506 (D.C. Cir. 1988); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621 (D.C. Cir. 1978).

6. For the reasons discussed in detail, infra, we find that an

evidentiary hearing is needed to resolve substantial and material questions of fact as to whether The Lutheran Church/Missouri Synod has the requisite qualifications to remain a Commission licensee. The issues designated for hearing concern KFUE/KFUE-FM's violation of our EEO Rule and possible misrepresentation or lack of candor.

## II. BACKGROUND

7. On September 29, 1989, The Lutheran Church/Missouri Synod (hereinafter "the licensee") filed applications to renew the licenses of stations KFUE/KFUE-FM,<sup>3</sup> Clayton, Missouri. The licensee indicated that when vacancies occurred, its policy was to seek out qualified minority and female applicants. It stated, "We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. We contact the various employment services and actively seek female and minority referrals ... " The licensee claimed to have hired a total of six persons, two white males and four white females during the renewal year.<sup>4</sup> The renewal applications were signed by Ralph A. Bohlman, president of The Lutheran Church - Missouri Synod.

8. Prior to receipt of the NAACP's petition, we requested that the licensee supplement its applications with details about recruitment efforts, as well as minority and female referrals because this data was originally omitted from the renewal applications. In its supplement, filed December 29, 1989, the licensee indicated that it sent general recruitment letters to three employment/personnel agencies and six educational institutions during the license term, but received no minority referrals.<sup>5</sup> It described some minority specific recruitment efforts taken in the last several months of the license term, reiterating that it hired six persons, all for upper-level

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<sup>3</sup> KFUE(AM) programs a religious format; KFUE(FM) has a classical music format. The license term ended February 1, 1990.

<sup>4</sup> Appended to the renewal applications was a completed acknowledgement form letter, dated July 21, 1989, from one of the licensee's referral sources indicating receipt of a recruitment letter from KFUE/KFUE-FM.

<sup>5</sup> We note that the sample recruitment letter, dated July 18, 1989, and appended to the supplement, refers only generally to job openings at KFUE(FM). The letter does not reference any specific types of vacancies at the station, nor does it indicate the type of skills or educational level required for any jobs at the station. The licensee states therein that it seeks minority and female referrals and will contact the source as job openings occur.

positions, from October 1, 1988, to September 30, 1989.<sup>6</sup>

9. In its January 2, 1990, petition, the NAACP asserted that KFUD/KFUD-FM's EEO program failed to indicate contact with minority organizations, media, or schools. Further, it charged that the stations did not indicate any minority and female referrals or hires. The NAACP noted that the only full-time minority employee was an Hispanic -- a minority group "not represented in the market in significant numbers." Asserting "self-evident" EEO non-compliance by KFUD/KFUD-FM, the NAACP advocated designation of the renewal applications for hearing.

10. In its opposition, the licensee argued that it had used multiple referral sources during the license term, not just employment agencies. Nevertheless, the licensee indicated several factors which "militat[e] against widespread employment recruitment at KFUD." First, it receives a large number of applications from write-in candidates due to the specialized nature of the program formats (religious and classical music). Second, because the stations' studios are located on the campus of Concordia Seminary, it has a reciprocal arrangement with the seminary to provide broadcast training to seminary students or their spouses in exchange for rent free studios. KFUD/KFUD-FM stated that seminary students and their spouses fill non-specialized positions (jobs which do not require theological training or classical music expertise).<sup>7</sup> Third, according to the licensee, management turnover has made it difficult to maintain a consistent recruitment program.

11. Regarding hires, the licensee contended that it employed minorities at a rate equal to the availability of those who possess the skills needed to work at the stations. The licensee explained that its formats require that nearly all upper-level positions (i.e., the majority of its jobs) be filled with persons with classical music expertise or theological training. It submitted that only 5% of Lutherans in the St. Louis area are minorities and those with "Lutheran training" constitute 2% of

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<sup>6</sup> The St. Louis Missouri-Illinois Metropolitan Statistical Area (MSA), where the stations are located, includes 43.2% females and 15.6 minorities (14.1% Black, .8% Hispanic, .5% Asian-Pacific Islander and .2% American Indian).

<sup>7</sup> The record reveals that seminary spouses (white, female) were hired for three full-time positions (two office/clerical, one professional). One seminary student (white, female) was hired for a full-time office/clerical vacancy. Thirteen seminary students were hired for part-time announcing positions (12 white males, one white female). Also, the spouse of a seminary student was hired as a part-time secretary (white, female). These hires occurred over the period October 1, 1986, through October 31, 1989.

the St. Louis population. The licensee stated that a recent audit of KFUD(FM)'s listeners revealed that 3.7% (or 2,693) are Black. It reasoned that the FM station's Black audience (which it calculated as .1% of the overall St. Louis population), represented the total local availability of minorities with classical music training.

12. To evaluate further the stations' EEO efforts, we sent a letter to KFUD/KFUD-FM on January 4, 1990, requesting the number of hires from October 1, 1986, to October 1, 1989, as well as the referral sources used to recruit for each position, the number of interviewees for each job (including gender, race or national origin), as well as the referral source, gender, race or national origin of the successful candidate. On February 23, 1990, the licensee indicated that it hired a total of 14 persons (10 full-time, 4 part-time) during the renewal year -- not six as it originally reported on the renewal applications -- but did not acknowledge or otherwise address the discrepancy between the hire data on its renewal applications and that in the inquiry response. Overall, it filled 28 full-time, including 24 upper-level, vacancies during the three-year period, including one upper-level Hispanic hire.<sup>8</sup> For its 28 jobs, the stations reported 51 interviewees, including one Hispanic interviewee. For 16 of the 28 hirees, the licensee indicated that their resumes were on file with the stations.<sup>9</sup> KFUD/KFUD-FM failed to identify recruitment contacts for each position, and the gender, race or national origin of those interviewed.

13. We sent a further inquiry letter on April 23, 1992, requesting the licensee to state specifically when it contacted referral sources for its vacancies during the three-year period. Also, we requested recruitment and hire data on each position filled between November 1, 1989, through January 31, 1990, the end of the license term.

14. By letter of May 12, 1992, the licensee answered our inquiry stating that it doesn't "use outside recruitment sources for every opening at the stations," because of the many unsolicited applications received and because the rent-free agreement with Concordia Seminary requires that it make special efforts to employ seminary students and their spouses "without resort to outside recruitment sources." Other than its regular contact

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<sup>8</sup> The resume for the Hispanic hiree was on file.

<sup>9</sup> Of the 16 hirees whose resumes were on file or who were referred by the staff, 12 hirees were for sales positions at KFUD-FM. The stations indicate that during the license term the hirees whose resumes were on file came directly from the International Center of the Lutheran Church/Missouri Synod, or through referrals by the Center/stations' employees.



with The International Center of the Lutheran Church/Missouri Synod (Lutheran Church headquarters), it appears that for eight (29%) of 28 jobs filled from October 1, 1986, to October 31, 1989, the stations contacted one to three outside recruitment sources,<sup>10</sup> and for three (75%) of four vacancies filled between November 1, 1989, and January 31, 1990, it contacted from one to seven outside referral sources.<sup>11</sup>

15. In a third letter to KFUD/KFUD-FM, we asked about the stations' failure to address the discrepancy between the renewal year hires reported on their renewal applications and those reported on their inquiry responses. By letter of July 13, 1992, the licensee provided a rationale for the discrepancy, stating that it had a "net gain" of six persons during the period October

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<sup>10</sup> For three of the eight positions (program director (AM) and two general managers (AM)) the licensee contacted The Lutheran Witness. For an additional general manager vacancy (FM), the licensee contacted The Lutheran Witness and Broadcasting Magazine. An announcer (AM) and a sales vacancy (FM) were recruited with the St. Louis Broadcast Center. A sales job (FM) was announced at the church headquarters and advertised in Broadcasting Magazine. A final position, director of audio resources (AM), was advertised in Lutheran publications.

The Lutheran Employment Project, a minority employment clearinghouse, was generally contacted once in 1989 for referrals for sales jobs, but it was never notified of a specific sales opening. Additionally, the licensee indicated that it has contacted a Black Lutheran minister every year since 1988 to request referrals for its file. It stated that the two or three individuals referred by the minister applied "when the station was not undertaking any hiring, and none of the individuals who submitted resumes possessed skills needed for subsequently available positions."

<sup>11</sup> The licensee's three hires toward the end of the license term for which it recruited with outside referral sources included two secretaries (AM and FM, respectively) and a newly created service/maintenance position for which two Black females and one Black male were hired. The Lutheran Employment Project was contacted for a secretarial position. The licensee used the following seven recruitment sources, including four minority specific sources, for an additional secretarial job and the maintenance vacancy: St. Louis Lutheran, St. Louis Sun, St. Louis Post Dispatch, Lutheran Employment Project, St. Louis American, St. Louis Argus, and the Metro Sentinel. The two positions were filled on January 30 and January 31, respectively, two days before the license term expired. The licensee did not conduct recruitment for the fourth hire, an associate director of development for KFUD(AM) for which a white male was hired.

1, 1988, through September 30, 1989. It indicates that it erroneously referred to this "net gain" when reporting the number of persons hired.

16. In a reply pleading, the NAACP argued that the licensee's discriminatory employment practices are evidenced by its extremely low minority employment and the near absence of minority recruitment activity. It faults the licensee for its failure to contact minority specific sources for upper-level positions and questions the stations' requirement for "Lutheran training" and its minority statistics. The classical music expertise criteria is "inherently discriminatory," states the NAACP, because the licensee has failed to show the need for such training. Lastly, it argues that the discrepancy in the renewal year hire information was in the licensee's favor because six hires, unlike the true number of hires, i.e., 14, would be perceived as statistically insignificant, and that such a discrepancy is a disqualifying misrepresentation.

17. The licensee answered the NAACP's reply comments on several procedural grounds. It also claimed that standard broadcasting industry practice requires that salespersons at classical music stations possess knowledge about the format. Lastly, it termed its representation of the renewal year hires as six rather than the actual 14, as an "understandable [albeit regrettable]" error.

18. In a fourth additional letter of inquiry to the licensee (November 17, 1992), we asked for the duties and responsibilities as well as the qualifications of the persons hired for positions from October 1, 1986, through October 1, 1989, which required either theological training or classical music expertise. We also questioned the licensee about the number of employees from 1987 to 1989 who were former employees of the International Center of the Lutheran Church/Missouri Synod or employee referrals. Additionally, we asked KFUD/KFUD-FM to explain how its practice of not recruiting for positions due to its agreement with Concordia Seminary comports with its obligations under our EEO Rule.

19. In its response of December 28, 1992, the licensee stated that no resumes were on file for former employees, and submitted the affidavit of its operations manager who stated that he recalled that one announcer had experience as a volunteer at a church "homeless" center; the other announcer attended Lutheran schools and was "once employed at Church headquarters" where she produced videos about the Lutheran Church. The licensee did not explain exactly what theological training was required for its announcing positions or how these two employees exhibited the

requisite skills and training prior to employment.<sup>12</sup>

20. Also, no resumes were on file for its sales staff. However, based on the recollection of the operations manager, the licensee asserted that many of the sales staff were knowledgeable about classical music, "although not all were."<sup>13</sup> The licensee did not specify what constitutes classical music expertise or why the requirement was apparently waived in some instances. KFUD/KFUD-FM reported that at least 16 of 28 (57%) employees hired during the three-year review period were referred by the stations' employees or were previous employees at the Church headquarters.<sup>14</sup>

21. The licensee stated that its hiring practices are consistent with Kings Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974), which exempts positions substantially connected with religious programming from the Commission's affirmative action rule. Moreover, according to the stations, "nearly all" of the jobs taken by seminary students were exempt from the EEO Rule based on Kings Garden and those that were not exempt were subject to important financial considerations (i.e., the rental agreement).

### III. DISCUSSION

#### EEO Implementation

22. Our review indicates that the licensee made 32 full-time, including 25 upper-level, hires from October 1, 1986, to January 31, 1990, for KFUD/KFUD-FM combined. Of those hires, KFUD(AM) had 14 vacancies (including eight upper-level jobs). The licensee did not recruit for seven (50%) of the 14 jobs. Our investigation reveals that it neglected to recruit for four of those jobs due to its agreement with Concordia Seminary that, in spite of our EEO Rule, the licensee would hire seminary students and spouses without affirmative, outside recruitment. The licensee seeks to excuse this arrangement by claiming financial considerations. See paragraph 10, supra. However, an

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<sup>12</sup> The stations indicate that 90% of the programming on KFUD(AM) is religious.

<sup>13</sup> We note the record reveals 14 sales hires during the three-year period and our letter specifically requested the classical music background of the persons hired for those sales positions. The stations provided data for only two of the 14 hires.

<sup>14</sup> The stations explain that they are not "separate legal entities" from the International Center of the Lutheran Church/Missouri Synod. All of the stations' staff are also employees of the Center.

arrangement, such as here, that results in lack of adherence to our EEO requirements because a station is getting rent free studios is unacceptable and contrary to our EEO policies.

23. The licensee filled an additional three unrecruited positions by a walk-in applicant from the church headquarters, a former church employee and a former consultant.<sup>15</sup> For five (all upper-level) of the seven jobs where limited recruitment was performed (see note 10, supra), the licensee did not contact recruitment sources likely to refer qualified minority candidates. The licensee argues that, due to a lack of "Lutheran training," minorities were deemed unqualified. We find the licensee's argument without merit because the record does not indicate that it ever used minority specific sources, or even widely circulated general sources, for five of seven AM vacancies where recruitment was performed. Recruitment was limited to The Lutheran Witness, other Lutheran publications and the St. Louis Broadcast Center. The licensee's conclusions about the qualifications of minorities in its MSA are speculative because it assumed its recruitment efforts would be unproductive without conducting any meaningful recruitment.

24. Of the 14 AM vacancies, the only recruited positions filled by Blacks were two lower-level jobs. These positions were opened or created after the Commission initiated a more extensive review of the stations' efforts and after the NAACP filed its challenge to the renewal applications. Thus, the licensee made its first efforts to recruit minority applicants only after its renewal applications and EEO program were questioned and challenged and then only for specific lower-level positions.<sup>16</sup>

25. Of the 18 vacancies filled at KFUD(FM), 14 (78%) (all upper-level) were unrecruited, including 12 sales jobs and two announcing positions. The licensee claimed that it restricted its recruitment efforts at KFUD(FM) because it required its sales staff to have classical music expertise and it deemed only 2,693 Blacks in the St. Louis MSA (its Black listenership) had such training. However, not all of the sales staff met the requirement of classical music expertise and the licensee failed to explain under what circumstances it waived this requirement. Moreover, again the licensee has engaged in speculation about the qualifications of minorities without having conducted any recruitment. It appears that all of the 14 unrecruited positions

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<sup>15</sup> Two of the 14 jobs at KFUD(AM) were filled by church contacts. Overall, 16 (50%) of 32 jobs at both stations were filled with church referrals.

<sup>16</sup> The secretarial and maintenance positions were filled within the last two days of the license term which expired on February 1, 1990. See note 11, supra.

were filled by church employees or persons referred by church employees. For the four remaining vacancies -- three upper-level, one lower-level -- where the licensee did recruit, only the lower-level position was announced to a minority specific source.<sup>17</sup> It would appear that the licensee's reasons for its failure to conduct recruitment at the FM station are inherently discriminatory and not based on the results of any actual recruitment efforts.<sup>18</sup>

26. We conclude that the licensee's explanations and reasons for failing to recruit -- "management turnover, classical music expertise, "Lutheran training" and the seminary agreement -- are unacceptable. The licensee cannot demonstrate one position prior to November 1989, some three months prior to license term expiration, where it used a referral source likely to attract qualified minority applicants. Moreover, the record does not reflect that the licensee ever satisfactorily explained what it intended by its requirements of "Lutheran training" or "classical music expertise" or that most of its hires met even those requirements. These vague, unascertainable criteria had a direct adverse impact on Blacks, foreclosing them initially from any employment with the stations and, subsequently, from upper-level employment. First, the fact that not all persons employed in sales positions had classical music expertise, at a minimum, raises questions about the bona fides of this criteria as a justification for not recruiting Blacks. Second, the licensee made no attempt to recruit minorities who did have classical music training. Third, the licensee's use of statistics on minorities with Lutheran training appears to evidence a pre-conceived notion about the suitability of minorities to perform certain jobs. Lastly, the licensee violated our EEO Rule in deference to its agreement with Concordia Seminary to employ seminary students and their spouses. The agreement with the seminary clearly abrogates our EEO Rule. As the court stated in Kings Garden, "like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations' ... the Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures." Kings Garden, *supra*, at 60. See also Radio Milton, Inc., 38 Fed. Reg. 20,939 (FCC 1973) (hearing designation order). In view of all of the foregoing, it appears that substantial and

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<sup>17</sup> We note that the vacancy for a general manager for the classical formatted station was recruited with The Lutheran Witness, a religious publication.

<sup>18</sup> Combined Annual Employment Reports from 1987 to 1990 (filed by May 31st in each year) show no Black employees in upper-level positions in any year and no Blacks at all until the 1990 report filed for the renewal year.

material questions of fact exist to whether the licensee's employment practices are discriminatory in violation of our EEO rule, 47 C.F.R. § 73.2080. These questions must be resolved in a hearing proceeding.

#### **Misrepresentation/Lack of Candor**

27. In its renewal applications and supplement, it appears the licensee misrepresented critical facts about its EEO program. In response to our question regarding the number of total hires (full-time and part-time) during the 12 months preceding renewal, the licensee responded (in renewal applications which were signed by the president of the licensee organization, The Lutheran Church/Missouri Synod) that it hired six persons. It repeated that representation some three months later in its renewal supplement. Then, after the Commission questioned the licensee about its specific recruitment and hiring efforts during the license term, the licensee provided new information which indicated hires more than twice the number originally reported. However, KFUA/KFUA-FM neither specifically addressed its earlier misstatements nor offered any explanation for the material change in information submitted. Not until our third inquiry letter, in which we specifically queried the licensee on the discrepancy, did KFUA/KFUA-FM attempt an explanation. That explanation is not dispositive of our concerns. It stated that it inspected records and concluded that it had a "net gain" of six hires. However, the licensee did not provide any data or records to substantiate how it made the calculation of six hires. Moreover, without the challenge to its renewal applications, the licensee's recruitment and hire record would have appeared much better than it actually was. Because we must rely on truthful reporting by our licensees in assessing the success of an EEO program, we are particularly concerned when we find the actual number of hires is more than twice the number of hires repeatedly reported. See Dixie Broadcasting, Inc., 7 FCC Rcd 5638 (1992); WXBM-FM, Inc., 6 FCC Rcd 4782 (1991).

28. Moreover, the licensee has been less than forthcoming in responses to inquiries regarding the specifics of its EEO outreach efforts. It appears that the licensee lacked candor in its representation of its recruitment program. In its renewal applications, the licensee stated that it recruited for vacancies as they occurred and that they actively sought female and minority referrals.

29. To the contrary, it appears that KFUA/KFUA-FM's license term recruitment efforts were severely limited. It mailed a general recruitment letter to nine referral sources approximately two and a half months prior to renewal. Additionally, the record reveals that only 11 of 32 jobs (34%) received recruitment and that minority specific sources were used principally in the last three

months of the license term for only lower-level positions. The license renewal applications were silent regarding the agreement with Concordia Seminary as well as the licensee's requirements for Lutheran and classical music training. Moreover, its general recruitment letter did not indicate that prospective applicants should have such training. In fact, the licensee did not reveal these important factors about its recruitment program until it filed its opposition to NAACP's petition. Without the challenge to its renewal applications, the licensee's true EEO program and policies might not have been ascertained.

30. Finally, it appears that the stations misrepresented their requirement of classical music expertise for its sales positions at KFUE(FM). The licensee described at length the scarcity of qualified minorities for sales vacancies; however, the record fails to demonstrate that all, or even most, salespersons hired during the license term met that requirement. Based on the foregoing, we conclude that a substantial and material question of fact exists as to whether and to what extent the licensee engaged in misrepresentation or lack of candor with respect to responses to Commission inquiries regarding the above matters in violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. § 73.1015.

#### IV. CONCLUSION

31. Based on the foregoing, we conclude that the licensee's submissions raise substantial and material questions of fact as to whether, in light of its inconsistent and erroneous responses, along with its failure to establish and maintain an equal opportunity policy, the licensee complied with Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080; and whether it misrepresented or lacked candor in providing information to the Commission concerning its recruitment and employment history and practices. We conclude that KFUE/KFUE-FM's renewal applications should be designated for hearing.

#### V. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), the above-captioned applications ARE DESIGNATED FOR HEARING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

- (1) To determine the extent to which the licensee of Stations KFUE/KFUE-FM complied with the affirmative action provisions specified in Section 73.2080(b) of the Commission's Rules, 47 C.F.R. § 73.2080;

- (2) To determine whether the licensee of Stations KFUE/KFUE-FM made misrepresentations of fact or was lacking in candor in violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. § 73.1015, with regard to the stations' EEO program and documents submitted in support thereof;
- (3) To determine whether, in light of evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience and necessity.

33. IT IS FURTHER ORDERED that, in accordance with Section 309(e) of the Communications Act, as amended, the burden of proceeding with the introduction of the evidence upon issues (1), (2), and (3) and the burden of proof with respect to all issues shall be upon the licensee The Lutheran Church/Missouri Synod.

34. IT IS FURTHER ORDERED that the Missouri State Conference of Branches of the NAACP and its St. Louis branch are made parties to the hearing ordered herein.

35. IT IS FURTHER ORDERED that, to avail themselves of the opportunity to be heard, the parties respondent herein shall, pursuant to Section 1.91(c) and Section 1.221(c) of the Commission's Rules, 47 C.F.R. Sections 1.91(c) and 1.221(c), in person or by attorney, file with the Commission, in triplicate, within twenty (20) days of the mailing of this Order, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. If the licensee fails to file a written appearance within the time specified, or within 20 days of the mailing of this Order, files a written statement expressly waiving its right to a hearing, the licensee's right to a hearing **SHALL BE DEEMED TO BE WAIVED**. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge, if no President Judge has been designated, **SHALL TERMINATE** the hearing proceeding with respect to the licensee and **CERTIFY** such portion or all of the case to the Commission in the regular course of business, and an appropriate Order shall be entered. See 47 C.F.R. § 1.92(c) and (d).

36. IT IS FURTHER ORDERED that The Lutheran Church/Missouri Synod shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 311(a)(2), and Section 73.3594 of the Commission's Rules, 47 C.F.R. § 73.3594, give **NOTICE** of the hearing within the time and in the manner prescribed and shall **ADVISE** the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's rules.



37. IT IS FURTHER ORDERED that irrespective of whether the hearing record warrants an Order denying the renewal applications of The Lutheran Church/Missouri Synod for Stations KFUE/KFUE-FM, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an **ORDER FOR FORFEITURE** in an amount not to exceed \$250,000, shall be issued against The Lutheran Church/Missouri Synod for the willful and/or repeated violations of Commission Rules Section 73.2080 (establishing and maintaining an affirmative action policy) and Section 73.1015 (submitting truthful statements to the Commission).

38. IT IS ORDERED that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b) (3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

39. IT IS FURTHER ORDERED that the Acting Secretary shall send by Certified Mail -- Return Receipt Requested -- one copy of this Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

Concurring Statment of Commissioner James H. Quello

In re Applications of The Lutheran Church/Missouri  
Synod For Renewal of Licenses of Stations KFUD/KFUD-FM  
Clayton, Missouri

It is with a heavy heart that I concur in this decision. While I recognize that the facts in this case legally support designation of the renewal applications of Stations KFUD/KFUD-FM for hearing, I nonetheless write separately to emphasize that I viewed this case with a careful eye, ever watchful of the fragile relationship between broadcasters and the federally-licensed spectrum on which they rely. Designation for hearing in my mind is, and will remain, a last resort only for the most serious of cases.

In this case, the licensee argued that its formats require that all upper-level positions be filled with persons with classical music expertise or theological training. Yet the licensee was unable to explain specifically why such a background was necessary to the performance of each upper-level job at the stations. Indeed, it appears that in some instances these jobs were filled by non-minority candidates who had neither classical music nor theological training.

I was also troubled by the licensee entering into an agreement with Concordia Seminary to provide broadcast training to seminary students and their spouses in exchange for rent free studios. This agreement, which was only brought to the Commission's attention in response to extensive inquiries, appears to be directly contrary to our EEO rule. This rule requires licensees to establish and maintain a program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities.

Finally, I am concerned with the discrepancy between the renewal year hires reported on the station's renewal applications (6) and those reported on their inquiry responses (14), especially in light of the fact that this "error" was in the licensee's favor.

In light of the above, I am compelled to concur with my colleagues in designating the renewal applications of KFUD/KFUD-FM for hearing.